not only tendered his apology to the plaintiff but also undertaken in open court to protect and safeguard the good name and deeds of the plaintiff since he became the Chief Minister of Sarawak. I take judicial notice that the plaintiff was appointed Chief Minister of Sarawak on July 7, 1970 and is still holding that high office of state.

In assessing damages it must not be lost sight of that this case is distinguishable from the cases which I have cited in this judgment in that there was no contest between the parties and the defendant, who is not legally represented, allowed judgment in default to be entered against him with damages to be assessed after he had failed to enter appearance to the writ. It seems to me that compensatory damages to be awarded to the plaintiff in respect of these two libels would be limited to fair compensation to the plaintiff's injured feelings. Bearing this in mind and taking into consideration all the relevant factors which should be taken into account, I would award to the plaintiff the sum of $25,000 as compensatory damages. The plaintiff is clearly entitled to costs of this action which costs are to be taxed on the higher scale.

Order accordingly.

Solicitors: *Satem, Nassar & Co.*

SIAH KWEE MOW & ANOR. v. KULIM RUBBER PLANTATIONS LTD.*

[O.C.J. (Abdoolcader J.) May 25 & 26, 1976; May 11 & 12, August 10 & 11, 1977; January 17-19, 24-26, November 21-23, 28-30, 1978 and February 20, 1979]

[Ipoh — Civil Suit No. 550 of 1967]

Contract — Agreement for sale of rubber estate — Breach of agreement by purchaser — Right of vendor to forfeit deposit — Allegation that vendor had breached terms of agreement — Breaches not proved — Breaches not fundamental — Purchaser did not choose to rescind agreement — Whether time of essence of contract — Extension of one month to complete granted — Whether time waived — Equitable principles — Whether applicable.

In this case the plaintiffs agreed to purchase a rubber estate in Perak for $3 million and paid the sum of $300,000 by way of deposit and part payment. It was a term of the contract that completion should take place on 30th August 1967. At the request of the plaintiffs time for completion was extended by one month to the 30th September 1967 and on their failure to complete by paying the balance of the purchase price on that day the defendants exercised their option to terminate the agreement and forfeited the deposit and part payment. The plaintiffs thereupon claimed the return of the deposit and part payment with interest. It was alleged by the plaintiffs that (a) the defendants were in breach of clause 10 of the agreement in that they altered the tapping system in certain areas of the estate and applied stimulant to the trees subsequent to the execution of the agreement without the plaintiffs' consent, knowledge or authority (b) the defendants were in breach of Clause 18(a) of the agreement in that they failed to or did not use their best endeavours to prevent interference by the estate labour force to access by the plaintiffs and their agents or representatives including prospective sub-purchasers to the estate and that this resulted in a repudiation of the agreement by the defendants.

The plaintiffs also claimed that the time for completion had been waived by the grant of the one month's extension and that time became at large so that they were entitled to reasonable time to complete the purchase. On the facts the learned trial judge found (1) that the defendants were not in breach of the agreement as they had used their best endeavours to ensure no interference from their labourers or other employees and there had been no prior notification of visits as required by Clause 18(a); (2) the changes effected in the tapping system, the application of stimulant and the introduction of Sunday tapping were all made with the full knowledge consent and approval of the plaintiffs and there had therefore been no breach of Clause 10 of the agreement; (3) the complaints about lack of access to the estate due to interference by the labourers and the changes in the tapping system, the application of stimulant and the introduction of Sunday tapping were only a smoke screen through which the plaintiffs hoped to be able to resile from the agreement.

Held: (1) there were no breaches of clauses 10, 18 or 19 of the agreement as alleged by the plaintiffs. Even if the plaintiffs had been able to prove the breaches alleged these were not fundamental breaches and would not amount to a repudiation of the agreement by the defendants as alleged and would only entitle the plaintiffs, if at all, to sue for damages;

(2) the defendants were entitled to forfeit the deposit and part-payment as the plaintiffs were in breach of the agreement in not completing the purchase by paying the balance of the purchase price on the date fixed for completion;

(3) by the extension of the completion date by a period of one month to a fixed date, time was not waived and did not become at large but remained at all times still of the essence and therefore there was no question that the plaintiffs were entitled, as they claimed, to be given reasonable time to complete the purchase of the estate;

(4) the principle of the intervention of equity to relieve against forfeiture is not applicable where the Contracts Act, 1950, applies in view of its specific provisions.

Cases referred to:-

(1) *Howe* v. *Smith* (1884) 27 Ch. D. 89, 103-104.
(2) *S.S. Maniam* v. *The State of Perak* [1957] M.L.J. 75.
(3) *Linggi Plantations* v. *Jagatheesan* [1972] 1 M.L.J. 89.
(4) *Barclay* v. *Messenger* (1874) 30 L.J. 351, 354.
(5) *Lock* v. *Bell* [1931] Ch. 35.
(6) *Tropical Traders Ltd.* v. *Goonan* (1964) 111 C.L.R. 41, 53-55.
(7) *White* v. *Ross* [1960] N.Z.L.R. 247, 248-249.
(8) *Wong Kup Sing* v. *Jeram Rubber Estates Ltd.* [1969] 1 M.L.J. 245.
(9) *Luck* v. *White* (1973) 26 P. & C.R. 89, 95.
(10) *Buckland* v. *Farmer & Moody* [1978] 3 All E.R. 929, 937.
(11) *Tay Say Geok* v. *H.G. Warren* [1963] M.L.J. 179; [1965] 1 M.L.J. 44.

CIVIL SUIT.

R.R. Chelliah (*V.W. Balasingam* with him) for the plaintiffs.

Dato Wong Seng Chow (*K.C. Loke* and *Paul Raj* with him) for the defendants.

Abdoolcader J:

Preliminary: Issues.

The plaintiffs' claim in these proceedings is for the return of a sum of $300,000 paid by them to the defendants by way of deposit and part payment for the purchase of a rubber estate in Sungei Siput, Perak known as Dovenby Estate. I should perhaps here observe that this suit has been beset by an unfortunate and chequered history of inaction as the writ was taken out on October 24, 1967, but the case only came on for hearing in the latter part of May 1976, and this took eighteen days stretched for various reasons over a period of some two and a half years.

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* We understand that there is no appeal against this judgment.

By an agreement in writing made on January 5, 1967, the plaintiffs agreed to purchase Dovenby Estate from the defendants for $3 million and under clause 2 had paid to them a sum of $300,000 by way of deposit and part payment. Clause 4 provided that completion of the purchase shall take place at the office of the defendants' solicitors before noon on August 30, 1967, and that in the interpretation of this clause time shall be deemed to be of the essence. It is apparent from the agreement that the plaintiffs intended to fragment the estate and sell it to sub-purchasers in sub-divided lots. Under clause 9 all produce up to the date of completion was to belong to and remain the property of the defendants.

As the case primarily revolves around allegations of breaches by the defendants of certain provisions of the agreement, it might perhaps be appropriate at this stage to set out *in extenso* the relevant provisions of the agreement in relation thereto which are clauses 10, 18 and 19:

"10. The vendor covenants that until the date of completion it will in every respect maintain the planted area of the said lands in accordance with the accepted principles of good husbandry and further covenants that it will not introduce any unusual system of tapping nor alter the systems already in force at the date hereof and the vendor undertakes to give statutory notice to all workers employed on the said lands, such notice to expire on or before the date of completion.

18.(a) The purchasers by their servants, agents and nominees shall have the right to enter upon view and survey the said lands hereby agreed to be sold at all reasonable times provided prior notification is given to the vendor's estate manager and provided always that there is no disturbance to the normal management and operation of the Estate and that no damage is caused thereby. During such visits by the purchasers their servants agents and nominees the vendor shall use its best endeavours to ensure that there shall be no interference from the vendor's labourers or other employees or contractors.

(b) The purchasers may likewise prospect for minerals and make trial borings on the said lands paying full compensation for any damage sustained by the vendors to any rubber trees, estate roads, drains or other the property of the vendors.

(c) The assessment of the vendor's estate manager as to the existence and extent of any damage sustained under this clause shall be final and conclusive.

19. Before that date of completion the vendor shall consent to the subdivision of the said lands in such manner as may be desired by the purchasers and the purchasers' duly authorised representative may with sub-purchasers enter upon and view the said lands at all reasonable times. The vendor shall sign all applications for such subdivision of the said lands. For the purchasers to bore the said lands the vendor shall give the necessary notice to the Mines Department and shall apply for conversion of such part or parts of the said lands into mining land as the purchasers may request. The vendor shall also allow surveys for subdivision to be carried out on the said lands by surveyors employed by the purchasers."

At the behest of the plaintiffs time for completion was extended by one month to a fixed date, September 30, 1967, and on their failure to complete by paying the balance purchase price on that day, the defendants exercised their right under clause 5 to terminate the agreement and forfeited the deposit and part payment received.

The plaintiffs plead that the defendants were in breach of clause 10 in that they altered the tapping system and applied stimulant to the trees subsequent to the execution of the agreement without their consent, knowledge or authority, and of clause 18(a) in that the defendants failed to or did not use their best endeavours to prevent interference by the estate labour force to access by the plaintiffs and their agents or representatives including prospective sub-purchasers to the estate, and that this resulted in a repudiation of the agreement by the defendants. I should perhaps mention that although in the statement of claim the plaintiffs rely on a breach of clause 18(a), Mr. Chelliah appearing for them contends that the breach was actually that of clause 19.

The plaintiffs plead in the alternative that the stipulation as to time under clause 4 for completion was waived by the breach of the provisions of clause 18(a) or rather, as their case has been put to me, clause 19, and that the plaintiffs had accordingly to apply for an extension of three months for completion but they were granted only one month to September 30. They contend that the time for completion was accordingly waived and became at large and that they were therefore entitled to reasonable time to complete the purchase. The plaintiffs claim in the circumstances the return of the deposit of $300,000 with interest and damages but Mr. Chelliah at the conclusion of his submission indicated that the plaintiffs were abandoning their claim for damages as they have not proved this.

The defendants in their defence plead and submit that the change in the tapping system in certain areas of the estate, the application of stimulant and the introduction of Sunday tapping were approved by the plaintiffs and effected with their full knowledge and consent, and that in any event the plaintiffs had acquiesced therein and are therefore estopped from alleging a breach of clause 10. They also contend in the alternative that the plaintiffs have by their conduct waived the alleged breach. The defendants deny a breach of their obligations under clause 18(a) and plead that they have at all times used their best endeavours to ensure no interference with the plaintiffs their servants agents and nominees during their visits to the estate from the defendants' labourers or other employees or contractors.

The defendants aver that they were at all times ready and willing to complete the sale in accordance with the agreement but that the plaintiffs were unable to complete the purchase at the agreed price and endeavoured to negotiate fresh terms for completion at a reduced price, and that on the plaintiffs' default in failing to complete on September 30, 1967, they were entitled to terminate the agreement and forfeit the deposit under the provisions of clause 5. They contend in the alternative that the plaintiffs had repudiated the agreement by evincing their inability to carry out the agreement and complete the purchase in accordance with its terms. They plead that at the behest of the plaintiffs and to assist them they agreed to one month's extension to September 30, 1967, for completion but that all the other terms and conditions of the agreement including the stipulation as to time being of the essence remained in full force and effect, and that in the alternative the date of completion was in any event of the essence of the contract when the defendants were required to give statutory notice of termination of service to their labour force to take effect on the date of completion. They go on to say that

even if the plaintiffs had been granted an extension of three months to complete the purchase, they would not have been able to do so at the agreed purchase price within such extended time or at all.

The defendants then plead that as a result of the plaintiffs' default they perforce had to sell the estate to a third party, The Great Alonioners Trading Corporation Berhad, for $2.6 million, thus incurring a loss of $400,000 which they would be entitled in any event to set off against any moneys which might otherwise be repayable to the plaintiffs. This subsequent sale of the estate was proved in evidence and is not in dispute and I should mention that the 1st plaintiff (PW1) agreed in cross-examination that it was possible that the main reason for the sale at a lower price was because of the declining price of rubber.

The two allegations made by the plaintiffs of breaches of the agreement by the defendants turn on the question of interference to visits to the estate by the plaintiffs and their agents or representatives including prospective sub-purchasers and the question of the changes effected in the tapping system and the application of stimulant in certain fields and the introduction of Sunday tapping.

Interference by Labour Force.

First, the question of interference and consequent non-access to the estate by the plaintiffs and their agents or representatives:

There was some interference by the labour force to visits to the estate by the plaintiffs and their agents or representatives but the question is whether or not in the circumstances there was in the event a breach of the relevant provisions of the agreement. The 1st plaintiff (PW1) said that on January 13, 1967, his chief agent or broker Vasudevan (PW5) was prevented from entering the estate and the next day he himself was also prevented, and he complained accordingly to the manager of the estate, Ferguson (DW4) who said that he would take steps against the trouble-makers. DW4 denied any such complaint. PW1 also said that he complained to DW4 about a survey party being denied access on January 16 and that a few days later PW5 was again prevented from entering the estate. He said that after this he himself and some sub-purchasers were stopped from entering the estate by some labourers, but again DW4 denied this.

On March 5, 1967, there was an incident when a broker, one Maniam who is now dead, apparently was alleged to have been assaulted by some labourers. PW1 said that before Maniam and his party went to the estate he informed DW4 they were coming, "to be on the safe side", as he put it. Maniam lodged a report to the police and it is significant that this is the only police report lodged in connection with any of the alleged incidents and also the first time that DW4 had been informed of any proposed visit. DW4 said in his evidence that if he had received prior notification of the visits by the purchasers or their agents he would have done his best to see they were not obstructed.

Now, in connection with this particular incident, DW4 said he received a telephone call from Maniam at about 9.00 a.m. on Sunday, March 5, to the effect that he was bringing a party of purchasers at 11.00 a.m. that morning. DW4 objected to the short notice and intimated this over the telephone to Maniam and to PW1 or one Chan and also said that he had an appointment in Sungei Siput at 11.00 a.m. that day. After some discussion it was agreed that the party would arrive slightly earlier and in the meantime DW4 rang up the police at Sungei Siput and requested a police patrol to be on the estate at 11.00 a.m. which the O.C.P.D. agreed to send but it turned out did not. DW4 met Maniam and his party of four who came in a car at the main gate and took one of them in his car with the other car following behind round the estate. Subsequently, a crowd of people gathered around the purchasers' car but refused to disperse when DW4 asked them to and he then left to fetch the police, and it was then that Maniam was alleged to have been assaulted. DW4 returned with the police who managed to get the crowd to disperse. It is interesting to note the evidence of Lim Choi Keng (PW4) who was in the party that day to the effect that Maniam was assaulted slightly, and that the people in the crowd touched him slightly and his clothes were slightly torn and to compare this with Maniam's report to the police (P4) which suggests a much more aggravated form of mishandling of his person.

As I have said, this apparently was the first time PW1 had informed DW4 of an impending visit to the estate by him or his agents or representatives. He did, however, in re-examination refer to some trouble he himself had in February, 1967, and made a somewhat bland statement that before going to the estate he had informed DW4 that he would be coming. It is somewhat remarkable that this was only said by him in re-examination and, in any event, it was not put to DW4 in cross-examination. I have already referred to DW4's evidence to the effect that if he had received prior notification of visits by the purchasers or their agents, he would have done his best to see they were not obstructed.

It is necessary in connection with this question of prior notification to DW4 of visits to the estate to consider the relevant clauses of the agreement and the submission of Mr. Chelliah in this respect. Briefly, Mr. Chelliah submits that the visits by sub-purchasers were under clause 19 and not clause 18(a) of the agreement. Under clause 18(a) prior notification of visits by the plaintiffs and their agents or representatives to DW4 was necessary whereas there was no such requirement under clause 19. Mr. Chelliah contends that clause 18(a) refers only to entry by a survey party and not to general viewing, and that clause 19 refers to visits by sub-purchasers with no prior notification necessary, on a strict interpretation of that clause. When, however, in the course of his taking this point I pointed out to him that if he is relying on a strict interpretation of clause 19 there were then no sub-purchasers as such for the purposes of that clause but only prospective ones, he then submitted that sub-purchasers in clause 19 would include prospective sub-purchasers in the context of that clause. I then asked him that if clause 18(a), as he contends, referred only to entry on the estate by a survey party for survey purposes only, what then was the purpose of the last

sentence in clause 19 for the vendor to allow surveys for subdivision to be carried out by surveyors employed by the plaintiffs, all he could say in reply was that the sentence in question was mere surplusage.

It is abundantly clear to me that all visits to the estate by the plaintiffs or their agents or representatives including brokers, prospective sub-purchasers and survey parties came within the ambit of clause 18(a) and prior notification to the Estate Manager (DW4) was therefore essential and necessary. Clause 19 is only ancillary and consequential to the provisions of clause 18 in dealing specifically with the question of applications for sub-division and boring, and it is of considerable significance that in their statement of claim the plaintiffs premised their claim purely on a breach of clause 18(a).

PW1 said nothing at all in examination-in-chief about his efforts to sell either portions of the estate or the whole of it other than by sub-division and sub-sales to sub-purchasers, but under cross-examination in answer to specific questions he had to admit that he met the Estate Union representatives with an offer to sell to them a portion of the estate comprising two titles. This is also borne out by Exhibit D9, the evidence of Gurusamy (DW2) who was at the material time the Chairman of the Estate Union Committee who said this offer was made in January 1967, and the evidence of DW4 who said this took place on January 14. I do not accept the evidence of PW1 in re-examination that his negotiations with the Estate Union started some time in February 1967. DW4 denied that it was only in the circumstances of obstruction of visits by sub-purchasers that the plaintiffs offered to sell part of the estate to the Estate Union at the end of February 1967, in an effort to quieten them down, and I accept this evidence. PW1 agreed in cross-examination that he had a second meeting with the Estate Union Committee together with a Dr. Yiap who I shall have occasion to refer to presently with regard to his position in the matter of the purchase of the estate by the plaintiffs.

PW1 also admitted under cross-examination to conducting negotiations with the National Union of Plantation Workers (NUPW) during the course of his negotiations with the Estate Union when he offered the whole estate for sale to NUPW for about $3.5 million. He said there was a meeting with the NUPW on February 27, 1967, when he gave them an option of 15 days and it was also then agreed that he had during this period to give prior notification to the Ipoh representative of NUPW before showing only two or three parties at the most around the estate. I would immediately point out that the incident on March 5, 1967, involving Maniam was within this 15 day period but there is no evidence that any such notification was in fact given as agreed to the Ipoh representative of NUPW. PW1 said that he was notified sometime in March that NUPW did not exercise the option given to them and that the Estate Union agreed to buy the two titles but had no money.

It is clear therefore that PW1 was not telling the truth when he said in examination-in-chief that as a result of all the interference he alleged and the consequent correspondence between the parties or their solicitors culminating in a letter of March 24, 1967, from the defendants' solicitors to the plaintiffs' solicitors he met the Estate Union to request them not to create trouble. He did not say a word about offering to sell the Estate Union a portion of the estate which he had to admit in cross-examination. I have already referred to the evidence of DW2 and DW4 on this aspect and it is clear that as early as January 1967, PW1 was already negotiating with the Estate Union for the purchase of two titles.

PW1 said that a survey party went to the estate on April 10, 1967, by arrangement and this was the first time they were able to do work and that there was accordingly a lapse of three months from the date of the agreement before they could do so. DW4, of course, denied this and I would also refer in this respect to the evidence of DW2 concerning PW1's negotiations with the Estate Union. PW5 who was the plaintiffs' chief broker in the matter of prospective sub-sales agreed that during the period of five months between April and September 1967, when completion was due to take place, he would have been able to sell most of the estate, PW1 himself admitted that the labour troubles had ceased in early April, and DW4 said that there was no incident after March 7, 1967, and that the plaintiffs and their authorised representatives were permitted to enter the estate thereafter as a result of a meeting between some police officers, the NUPW field officer and members of the Estate Union Committee on that day.

I would therefor pause at this stage to consider the evidence with regard to the financial ability of the plaintiffs to complete the purchase by paying the balance purchase price of $2.7 million on the date fixed for completion. PW1 agreed under cross-examination that his sole intention in the matter of paying the balance purchase price was that this should be from the proceeds of sales to sub-purchasers. He admitted that all that the plaintiffs had was $300,000 for the deposit and that they had no other means of raising the balance sum of $2.7 million. He said he had attempted to raise this balance by loans from two banks in April or May 1967, and two business friends in March 1967, but was unsuccessful. From May onwards until September 1967, he had made other efforts to get finance. He approached a finance company but they only agreed to a loan for a small sum. He agreed under cross-examination that after the agreement was signed the price of rubber declined and that this trend continued until the end of the year. He further agreed that a survey of the estate was completed at the end of April or the beginning of May 1967, and that he still had four to five months to dispose of the estate, and that during this period a few sub-purchasers at the beginning wanted to buy lots but towards the end no one wanted to buy because the price of rubber had gone down. The plaintiffs attribute their inability to complete to the interference caused to visits to the estate by sub-purchasers but from his own evidence PW1 had perforce to admit that their financial ability and the declining price of rubber certainly did not play an unimportant part in the end result.

PW5, the plaintiffs' chief agent or broker, gave evidence of three visits he made to the estate with prospective sub-purchasers, the third being that on March 5 when the Maniam incident took place. He said his first visit was in the middle of January 1967, when he was stopped by labourers and turned back. The second visit was in the early part of February 1967, when again his car was stopped by a number of labourers and he had to return to Ipoh and then informed PW1 of what had happened. There is no evidence that DW4 was informed of the second visit but in respect of the first visit PW5 said that he took prospective buyers to the estate sometime in the middle of January 1967, and before going he informed PW1 who rang up the Estate Office and informed them that PW5 was coming to view the estate. If this was indeed done, I would point out that the obligation in clause 18(a) of the agreement was to notify the Manager (DW4) and not any unauthorised person in the Estate Office. But with regard to the first visit PW1 said that PW5 took some prospective buyers to the estate on January 13 but was prevented by the labourers from entering and that on the following day he (PW1) went to see DW4. He said nothing at all about telephoning the Estate Office and informing anyone of PW5's proposed visit with prospective buyers. While still on PW5's evidence, he admitted having read an article in the *Straits Times* in the issue of April 13, 1967, (D9), dealing with the matter of the plaintiffs selling a portion of the estate to the labourers and said, in answer to a question I put to him, that he asked PW1 about this article and PW1 did not deny its contents. PW5 said that he knew nothing at all of the scheme referred to in D9 before reading it.

DW2 said in evidence that there were no disturbances in the estate before the Estate Union Committee's second meeting with the plaintiffs in February 1967. He said that DW4 had asked the Estate Union Committee on two occasions to stop obstruction of the plaintiffs' representatives on their visits to the estate but the committee members replied that they were unable to control the labourers who would not listen to them as at that time the tension was very high. DW4 said that on January 14, 1967, when the plaintiffs had offered the scheme to the Estate Union Committee to purchase two titles in the estate he remembered handing out a number of estate letterheads to the plaintiffs and also a sample of a copy of an authorisation letter to the Estate Union Committee to be used in the letterheads, and that these were to be produced on demand by any proposed purchaser or authorised agent of the plaintiffs but that as far as he knew these letterheads were never used or asked for. DW4 did give evidence of one occasion when Dr. Yiap was alleged to have been prevented from entering on February 17 or 18, 1967, when he was stopped at the gate as a result of which he went to Chemor and telephoned DW4 who then arranged to meet him at the estate entrance which he did and escorted him to his estate bungalow. There was no prior notification however of this visit by Dr. Yiap.

It is now necessary to consider some correspondence on this aspect. On the very day of the agreement the plaintiffs wrote to the defendants' agents referring to clause 7(b) of the agreement and stating that when they took possession of the estate they would not require the services of the staff or labourers then employed in the estate. When he was cross-examined on this letter, PW1 agreed that he would expect the labourers to be agitated on knowing the contents of such a letter and that the reaction of the labourers was therefore not unexpected, but he took great care to add that this could have been controlled. PW5 said under cross-examination that he had experience of fragmentation and that if a letter like this was sent he would expect labour unrest, and he went on to agree that the labour unrest on the estate that occurred was not unnatural.

The plaintiffs' solicitors wrote to the defendants on January 25, 1967, complaining of interference by the labourers, referring no doubt to the interference with the survey party on January 16 as they enclosed a copy of a letter of January 17 to them from their surveyors. DW4 in his evidence said that the arrival of the survey party sparked off a row between them and the labourers in view of the verbal agreement reached between the Estate Union Committee and the plaintiffs that the plaintiffs would not bring in anyone to the estate for three weeks as the Estate Union would during that period be considering the plaintiffs' offer to them to purchase part of the estate. DW4 added that the three week recess was given as otherwise the labourers would have created trouble. I accept his evidence on this and the survey party visit was therefore not only in breach of this agreement with the Estate Union Committee but also made without prior notification to DW4.

The defendants replied thereto on January 30 stating they had given instructions to DW4 to take the sternest disciplinary measures against any future offenders and enclosing a copy of a letter of the same date they had written to DW4 with firm instructions to this effect and advising that he was at liberty to call in any Government or police assistance required. DW4 said that before receipt of this last letter he had already issued a warning to the Estate Union around January 22, 1967, and that after receipt of this letter he had again warned them. PW1 agreed under cross-examination that in the light of this letter of January 30 from the defendants to DW4, the manager of the estate, the defendants were taking all possible steps without causing chaos or industrial action.

The plaintiffs' solicitors wrote again on February 22 to the defendants complaining there was still interference to which the defendants replied on February 27 further explaining the position and the measures taken, and DW4 in his evidence said with regard to the last paragraph of this letter that he and Mahoney, the Director of the Estates Department of the defendants' agents, had met the Chief Police Officer, the Head of the Labour Department and one other official on February 27 itself. The plaintiffs' solicitors wrote to the defendants on March 9 complaining of the Maniam incident on March 5, and the defendants' solicitors replied thereto on March 17 setting out all the measures taken by the defendants to deal with the situation complained of. This letter is borne out by the evidence of DW4 and, in particular, that pertaining

to a lecture by a police officer to the persons present at the entrance gate on March 6 and a meeting at the Estate Office on March 7 which I have referred to.

DW4 also gave evidence of all the other steps he had taken such as trying to obtain a list of the labourers responsible for picketing at the entrance gate in contemplation of obtaining a court order but that he was unable to obtain any names of individuals. DW4 also testified to notices being put up on the Estate Notice Board and read out to the Estate Union Committee in the vernacular and of the same notice being placed at the estate shop, packing shed and collecting station. He also testified that Ahearne of the defendants' agents visited the estate on February 28 and warned the Estate Union Committee that the labourers by picketing were committing an unlawful act and that this should cease, and that Ahearne also referred to the legal contract between the plaintiffs and defendants which could not be broken by a third party and six other points of law.

PW1 agreed under cross-examination that the measures specified in the letter of March 17, 1967, had been carried out and that the defendants had taken all reasonable and possible steps to remedy the situation, but he carefully added that all this should have been done much earlier, suggesting in effect that the defendants should have anticipated the several acts of interference even before they occurred. There was then a further letter on March 24 from the defendants' solicitors stating that eight persons would be charged in court regarding the Maniam incident on March 5. The defendants were obliged under clause 18(a) of the agreement to use their best endeavours to ensure that there should be no interference from their labourers or other employees or contractors, and it would appear that they had indeed done so even on PW1's own admission.

On May 20, 1967, the plaintiffs' solicitors wrote to the defendants asking for an extension of three months for completion of the sale, stating they were "asking for this indulgence because the first 3 months of the signing of the sale agreement were wasted on the labour problems and no productive effort could be done." It is interesting to note that although the tapping changes, application of stimulant in two fields and the introduction of Sunday tapping were made in April, no mention whatsoever of these matters were made in this letter and they were only raised for the first time in a letter written by them on June 26, 1967. PW1 agreed under cross-examination that the reason given in the second paragraph of this letter of May 20 was not the whole reason and further agreed that during the period from January to March 1967, he was negotiating with the Estate Union for the sale of two titles and also with NUPW for the sale of the whole estate, and that these were additional reasons for asking for an extension of time for completion.

The defendants agreed to extend the date of completion of the sale to September 30, 1967, and confirmed this in a letter from their solicitors to the plaintiffs' solicitors on May 27, 1967, stating that this indulgence had been granted purely to assist the plaintiffs. and did not in any way imply any responsibility on the defendants' part for any delay which might have occurred in the plaintiffs' plans. There was no protest by the plaintiffs of any kind against the extension of one month granted as against their request for three months or against the specific observation in the letter of May 27 I have mentioned. As a result of the extension granted the defendants' solicitors wrote to the plaintiffs' solicitors on July 21, 1967, informing them that the defendants would at the end of August proceed to give the necessary notices to their labour force to terminate their employment on the date of completion, namely, September 30, 1967. PW1 under cross-examination agreed that the defendants were aware time was of the essence of the contract and that they were doing everything possible to comply with the terms of the agreement, and that the change in the tapping system was not a reason for asking for an extension of time for completion.

In the circumstances, I find that the defendants were not in breach of the agreement as they had used their best endeavours to ensure no interference from their labourers or other employees and there had been no prior notification of visits to DW4 as required by clause 18(a) except for the very short two-hours' notice given for what may conveniently be termed the Maniam visit on March 5, 1967.

Tapping System Changes.

Second, the question of the introduction of the tapping changes, application of stimulant and Sunday tapping:

Before I deal with this question, it is necessary in the first instance to deal with the position of Dr. Yiap as he figures somewhat prominently in this particular aspect of this matter. Dr. Yiap appears to have been actively associated with the plaintiffs in the matter of their purchase of this estate, and according to a letter of December 10, 1966, from the plaintiffs to the General Manager of the defendants' then agents, it was Dr. Yiap who had by telephone intimated the revised offer of $3 million for the purchase of the estate, and that letter was written to confirm that telephone conversation, PW1 said that he made use of Dr. Yiap's services because the latter was more conversant in English and they were dealing with a European company. He said that Dr. Yiap who had since migrated to Australia had no relationship with his firm but was his friend and that he had left the country after May 13, 1969, and he had no correspondence with him. He tried to contact him in Australia after obtaining his address from a friend but received no reply. I had occasion to observe in the course of the trial to Mr. Chelliah on the importance of Dr. Yiap's evidence in this matter and in the course of one of the hearing sessions he informed me that the plaintiffs had been able to communicate with Dr. Yiap who would be attending court to testify but later told me Dr. Yiap had cabled to say he would not be able to attend in view of other commitments.

It then appears that, entirely without my knowledge, an application was made by the plaintiffs' solicitors by a summons-in-chambers on May 26, 1977, to take the evidence of Dr. Yiap *de bene esse* in Australia, and the affidavit in support of that appli-

cation was affirmed by Mr. V.W. Balasingam, the solicitor for the plaintiffs, clearly stating that Dr. Yiap was a material and necessary witness "from letters which passed between the parties and their respective solicitors before the action was commenced." The writ in these proceedings was issued on October 24, 1967, and this application was made one year after the trial commenced in May 1976, and after four days of hearing with the continued hearing of this case fixed for eight days commencing on August 9, 1977. The application was heard by another judge on June 20, 1977, who dismissed the application with costs on an objection taken by the defendants on the inordinate delay in making the application mid-way during the trial, and Mr. Balasingam confirms this was the reason for the dismissal of the application. There was no appeal against the refusal of the order sought and I think I can fairly conclude that the application was made only for the purpose of submitting at the end of this case that some effort had been made to try to get Dr. Yiap to give evidence.

As the plaintiffs' solicitor himself affirmed in his affidavit, the importance of Dr. Yiap's evidence was disclosed in correspondence before the action was instituted in October 1967. It would appear therefore that the plaintiffs could have long before May 1977, procured Dr. Yiap's evidence either *de bene esse* or by personal attendance in court but had apparently made no such efforts, and I think that in the circumstances a presumption arises under the provisions of illustration (g) to section 114 of the Evidence Act, 1950 that his evidence which could have been but has not been produced would, if produced, have been unfavourable to the plaintiffs.

I will next have to consider Dr. Yiap's status in relation to the plaintiffs and whether he was held out by them as having authority to make commitments on their behalf in the matter of this transaction with the defendants. As I have said earlier he was in the picture, so to speak, right from the inception and made the revised bid for the purpose of the estate which culminated in the agreement between the parties. PW1 in his evidence had perforce to admit that he was not aware of and unable to confirm or deny Dr. Yiap's several visits to and telephone conversations with the Manager of the Estate (DW4) which were put to him in cross-examination. He however conceded that he did not at any stage advise the defendants or their agents that Dr. Yiap was only an interpreter and that he had no authority to act on the plaintiffs' behalf and admitted that it was fair to assume the defendants or their agents would in fact have considered Dr. Yiap to have authority to act on behalf of the plaintiffs.

Bennett (DW1), a Director and Secretary of the defendants' agents, said that at the meeting in Ulu Tiram between the parties which was called at the behest of the plaintiffs and which I shall have to advert to presently, the one who did all the talking on behalf of the plaintiffs was Dr. Yiap and he was given the impression that Dr. Yiap was at least an agent or person of similar standing on behalf of the plaintiffs — something more than an interpreter, and that he gained the impression that Dr. Yiap had authority to speak on behalf of the plaintiffs. And later, he said that Dr. Yiap was a person of suitable authority to write to with regard to confirmation of the tapping system to be introduced.

There is then the article in the *Straits Times* (D9) in which Dr. Yiap is described as an associate of the plaintiffs, and I have already referred to the evidence of PW5 when he said that PW1 did not deny the article in question when he was asked about it. Whilst I am on the subject of D9, I should perhaps interpose to say that DW2 denied the statement attributed to him in D9 but I have to look askance at this aspect of his evidence, as while he was in the midst of cross-examination and after the adjournment for the day he was discovered by counsel for the defendants having a drink with the plaintiffs at the Station Hotel, Ipoh. When counsel complained of this to me the next morning I had occasion to warn DW2 and both plaintiffs when they admitted it, and I was informed and made a note of the conversation that took place between them.

DW4 said that Dr. Yiap was not a mere mouthpiece of the plaintiffs and was very much more than that. He got the impression that Dr. Yiap was an equal partner with the plaintiffs as he did all the speaking, made all the enquiries as to whether the property had been test-bored for tin and what the results were, and he seemed concerned at the rubber production in the estate. DW4 said that it appeared to him Dr. Yiap had authority to speak on behalf of the plaintiffs. He said that he was all the time under the impression Dr. Yiap was a partner with the plaintiffs at all times and was their main spokesman, and that he had no reason whatsoever to doubt Dr. Yiap when the latter consented to the proposed changes in the tapping system.

In the light of all this evidence and in particular PW1's own admission, I find that the plaintiffs had indeed by their conduct held out Dr. Yiap as having authority to act and make decisions and commitments on their behalf as the purchasers of the estate and that he was as a result properly accepted by the defendants as the voice and mind of the plaintiffs.

To proceed now to the change in the tapping system and related matters complained of by the plaintiffs, Hawkins, a visiting agent to the estate, visited the estate in the latter part of November 1966, and put up a report (D11) recommending certain changes in the tapping system. Hawkins' report was sent to London with certain modifications recommended by DW4 and the report as modified by DW4's recommendations were approved by London. DW4 said in evidence that he had spoken to the purchasers sometime in January 1967, about the tapping changes and the application of stimulant to Field 49 and the changes he had in mind to the system recommended by Hawkins, and he added that by referring to purchasers at this discussion he meant PW1, Dr. Yiap and possibly one Chan and the 2nd plaintiff.

DW4 said that he came to Ipoh on Sunday February 12, 1967, and met Dr. Yiap in the house of one Chapman, a friend of his, who lived across the road from where the purchasers had rented a house. He said they had a short discussion over a drink and

he gave Dr. Yiap a pencilled draft copy of the tapping changes to be adopted as a result of D11 and his own recommendations to London and Dr. Yiap agreed to the changes being effected, stating that the purchasers had no objection to them. As a result he wrote a letter the next day, February 13, to the defendants' agents stating that Dr. Yiap had no objection to the proposed changes which he set out in detail in that letter, and that Dr. Yiap had also agreed that three stimulant applications during the year together with Sunday tapping could be carried out in future. He asked the defendants' agents to write and get the plaintiffs to confirm this. DW4 said that he wrote this letter because he had been asked by Price (DW3) who was then a visiting agent to the estate to get the approval of the purchasers before introducing any changes. This letter of February 13 was sent by the defendants' agents under cover of a letter of February 16 to Dr. Yiap c/o Siah Brothers Trading Co., the plaintiffs' firm, with a request for confirmation of the alterations in the tapping system as agreed verbally with DW4. The plaintiffs claimed that they never received this letter of February 16 and the enclosure as there was an error in the address as a result of which they alleged the letter must have gone astray.

PW1 said in his evidence that Dr. Yiap told him he had met Ferguson at the Ipoh Club on February 12. He however admitted he had rented a house in Ipoh opposite Chapman's house and that it was possible that Dr. Yiap first met DW4 on February 12 at Chapman's house and later adjourned to the Ipoh Club. I must say immediately that I accept the evidence of DW4 that Dr. Yiap did agree to the proposed changes on February 12, and, as I have said earlier, he was held out by the plaintiffs as having authority to do so. I find no reason whatsoever to disbelieve DW4, and having seen and observed him while giving evidence I can see no reason for saying that he was telling anything other than the truth. I cannot accept Mr. Chelliah's submission that DW4 was lying in regard to this February 12 discussion with Dr. Yiap.

The plaintiffs wrote to DW4 on February 22, 1967, stating that PW1, his brother Siah Kwee Swee (PW6) and their assistants would visit the estate on Saturday, February 25 to discuss with DW4 the change in the method of tapping. PW1 said in his evidence that a day of two before writing this letter Dr. Yiap had said that DW4 had told him he wanted to change the tapping system and Dr. Yiap had asked him to speak to DW4 and that it was because of this that he wrote the letter in question for a discussion. PW1 said that he saw DW4 on February 25 when he went with PW6 who had knowledge of tapping systems and that was why he was brought along. PW1 testified that he did not agree to the changes and asked DW4 to write in to him officially. He said that DW4 told him that he had discussed the matter with Dr. Yiap who could not decide for himself and had asked him to speak to PW1. But DW4 said that at this meeting on February 25, PW1 appeared to be interested in the tapping changes that had been accepted by Dr. Yiap and asked for some particulars with regard to the application of stimulant which were given and that on being shown certain records PW1 appeared to be completely satisfied, and that PW6 took no part in the discussion. DW4 said that PW1 made no request for the changes in the tapping system to be put into writing and that he was only interested in the question of stimulation. He said that PW1 did not say that the tapping system should not be changed and there was no mention of anything but the stimulation question.

It is of some interest with regard to this meeting of February 25 to consider the evidence of PW6. He said that they went to DW4's house which I find surprising as neither PW1 nor DW4 said that the meeting took place in DW4's house. It is difficult to see what part if any at all he took in this discussion, and his evidence was convoluted and would appear to indicate that he did not himself know what he was talking about and certainly does not bear out PW1's evidence that he was brought along because of his expertise in tapping systems. PW6's only supposed qualification was that he had been a rubber tapper once when he was 14 or 15 years of age. All he said was that he heard PW1 and DW4 talking about a change in the tapping system and the application of medicine on the bark of the trees and he told PW1 this could not be done. Without knowing what changes were to be effected, under cross-examination he said PW1 told him DW4 wanted to change the tapping system but did not say how and on that he said it could not be done, and he added that he did not know the tapping system used when he went to the estate on that day. In re-examination, he said that DW4 wanted to change the system of tapping without saying how and then added that ordinarily half spiral would be tapped and if DW4 wanted to change it must have been to full spiral. As against this, there is the evidence of Price (DW3), a Visiting Agent, who is certainly very much more of an expert, to put it mildly, than PW6, who said that the proposal to change was from full spiral to half spiral, yet retaining the same intensity of 86 per cent.

In answer to a specific question I put to him, PW6 said that when he spoke of a change in the tapping system he did not know from what to what. Also in answer to me, he said that PW1 told him Sunday tapping was discussed but he did not know what was said. He then said PW1 told him he did not agree to Sunday tapping and then went on to change his evidence by stating that he advised PW1 not to agree to Sunday tapping after having earlier said that he did not know what was said regarding Sunday tapping. When confronted with the letter of July 22, 1967, from the plaintiffs' solicitors to the defendants' solicitors which said that the plaintiffs had agreed to Sunday tapping only if there was no tapping on Saturdays, PW6 said he did not know about this. I cannot therefore, in the circumstances, accept any of the evidence given by PW6 with regard to this meeting on February 25.

Still on the subject of this meeting on February 25, PW1 said that at this meeting DW4 did tell him of a letter written to Dr. Yiap before February 25, presumably referring to the letter of February 16 which I have already referred to and which was wrongly addressed and alleged to have gone astray. He then

said he could not remember the date and then resiled again to say that the matter of writing a letter to Dr. Yiap was not brought up at the meeting on February 25. In view of all this, I cannot but reject the evidence of PW1 with regard to what transpired at his discussion with DW4 on February 25, and I accept the evidence of DW4 in this regard.

PW1 said that he visited the estate sometime early in May 1967, and discovered that the tapping system had been changed and also that there had been application of stimulant, and he enquired of DW4 who told him this made no difference. But under cross-examination, he said that Dr. Yiap had told him of his meeting with DW4 one or two days after February 12 and that this could have been on February 14, and he added that Dr. Yiap told him that the change in the tapping system would take place in April or May and it was because of this that he did not write to DW4 until February 22 to arrange a discussion regarding the change in the method of tapping. This corroborates the evidence of DW4 which I have already discussed and clearly indicates that what he said regarding Dr. Yiap's agreement to the changes is true. PW1 must therefore have known of the changes to be effected well before May when he said earlier in his evidence-in-chief he discovered the changes. If knowing that the changes would take place in April or May, as he said Dr. Yiap had told him, and having told DW4 on February 25 to write in officially regarding the changes as he said he did and not having received any such letter, then it would be reasonable to have expected him to have at least written to DW4 to ask for the changes to be stopped but apparently nothing whatsoever was done until June 26, 1967, which was the first time the question of the tapping system was raised by the plaintiffs' solicitors and which incidentally was also about the time the plaintiffs' efforts to get financial assistance to complete the purchase proved unsuccessful.

PW1 then said that on May 18, 1967, he wrote to the Rubber Research Institute who sent him Tan Teo Kim (PW2), their Estates Advisory Officer, and PW1 asked him to make a report only in respect of two fields, Fields 50 and 57. PW2 then submitted a report dated May 31, 1967, (P6) on these two fields. If indeed the tapping system was fundamental then I would have expected an investigation into the whole estate and not just two fields. PW2 said in answer to me that when he went to the estate with PW1 for an inspection before making his report (P6), PW1 did not tell him there had been a change in the tapping system but only told him of the then current tapping system. PW2 said that his report was premised and based on information given to him by PW1. He also agreed that his report was purely a recommendation and a guide which he would expect to be followed but not necessarily and, in answer to me, he said that it was possible for some other expert to differ from his recommendation and set up his own ideal. PW1 also agreed under cross-examination that P6 only contained recommendations which need not necessarily have been accepted and DW3, a Visiting Agent himself, testified to the same effect.

On June 26, 1967, the plaintiffs' solicitors wrote to the defendants' solicitors asking for comments on the tapping system in respect of two fields only, Fields 50 and 57. In cross-examination, PW1 admitted that he complained only about these two fields although there were other fields as well and that neither he nor his solicitors made complaints about any other fields. PW1 agreed in cross-examination that this was the first time the plaintiffs raised the matter of a change in the tapping system, and, I might add, this too some three to four weeks after receiving the report (P6) from the Rubber Research Institute. This letter of June 26 was in fact only a complaint of the effect or result of the changes effected and not that changes had been effected at all without the plaintiffs' consent. It was not a complaint of a change in the tapping system effected unilaterally, and there is no oral or written evidence whatsoever as at this stage of any protest against the changes in the tapping system adopted allegedly without the plaintiffs' consent. This letter was written by the plaintiffs' solicitors and there was no reference whatsoever to clause 10 of the agreement. PW1 agreed under cross-examination, as I have pointed out earlier that the change in the tapping system was not a reason for asking for an extension of time for completion which he did in May.

The defendants' solicitors replied on July 3 to this letter of June 26 giving the required comments and explanation and stating that if the plaintiffs did not now agree with the existing system which hitherto had met with their approval, the defendants would be pleased to have the plaintiffs' proposals which they would only be too happy to implement, if in accord with normal husbandry, and in particular would discontinue Sunday tapping if the plaintiffs so wished.

In reply thereto the plaintiffs' solicitors wrote on July 22 and now for the first time queried why the tapping system adopted at the date of the agreement had since been changed. In this letter it was stated that the plaintiffs had agreed to Sunday tapping only if there was no tapping on Saturdays but, as I shall point out presently, in a subsequent letter from their solicitors dated July 31 the plaintiffs denied they had ever agreed to Sunday tapping. With regard to Sunday tapping I would also refer to the evidence of DW2 when he said that the Estate Union Committee had asked PW1 if they could tap rubber on Sundays and he agreed to that, and he went on to say that Sunday tapping would have enabled the Estate Union members to get more income to repay the bank loan which they had hoped to obtain for the purchase of a portion of the estate. And DW4 had also said in evidence that at their meeting on February 12 Dr. Yiap had agreed that Sunday tapping could be adopted. In this letter of July 22 the plaintiffs' solicitors intimated that the plaintiffs had not received the letter of February 16 from the defendants' agents which I have already referred to as alleged to have perhaps gone astray, and they also denied the arrangements mentioned therein.

The defendants' solicitors replied on July 24 enclosing copies of the letter of February 16 and the enclosure therewith of February 13 requesting formal confirmation of Dr. Yiap's agreement on February 12

to the changes to be effected, and also a subsequent reminder of April 4, 1967, addressed similarly referring to their letter of February 16 and stating that as there had been no indication otherwise it was assumed that the proposals made by DW4 were fully agreed to. I have already referred to the evidence of PW1 when he said that DW4 told him of a letter written to Dr. Yiap at their meeting on February 25 which could only have referred to the letter of February 16 and its enclosure but then resiled. DW1 said that the letters in question had not been returned to them as a result of the error in the address and that the envelopes used by his company (the agents for the defendants) had their company name and address printed on the outside.

The plaintiffs' solicitors wrote on July 31 to the defendants' solicitors in reply pointing out that the February 16 and April 4 letters had been wrongly addressed and must have gone astray, and alleging a breach of clause 10 of the agreement. This was the first time such an allegation by reference to clause 10 was made and no mention appears of any breach of clauses 18 or 19 in this letter. With regard to the letter of February 16 which it was alleged must have gone astray, I cannot but wonder, if indeed that letter had not been received, why PW1 thought it necessary to write on February 22 to DW4 to arrange a discussion on February 25 "regarding the change in the method of tapping", and I must once again refer in this respect to his evidence that Dr. Yiap had told him that the tapping changes would take place in April or May. I have already found that Dr. Yiap did agree to the changes on February 12 as stated in evidence by DW4, and I reject PW1's evidence which I have mentioned earlier as to what Dr. Yiap was alleged to have told him a day or two before he wrote the letter of February 22 to DW4. In this letter of July 31 the plaintiffs denied they ever agreed to the tapping changes effected, the application of stimulant or Sunday tapping although, as I have said earlier, in their letter of July 22 the plaintiffs' solicitors admitted that the plaintiffs had agreed to Sunday tapping.

The defendants' solicitors replied on August 1 formally joining issue and after taking instructions from the defendants on the plaintiffs' solicitors' letter of July 22, wrote on August 4 to the plaintiffs' solicitors giving a full explanation regarding the changes and how they came to be effected with the agreement of Dr. Yiap in Ipoh on Sunday February 12 and the approval of PW1 on February 25, and also dealing with the question of manuring. In that letter they pointed out that they had specifically asked in their letter of July 3 for the plaintiffs' proposals with regard to the tapping systems including the continuance of Sunday tapping and that as over a month had since elapsed and no proposals had been forthcoming, the defendants assumed that the existing systems met with the plaintiffs' continuing approval. Despite the repeated requests in the defendants' solicitors' letters of July 3 and 24 and August 4, the plaintiffs made no proposals for changes in the tapping system then in operation in reply to an invitation to do so.

The plaintiffs' solicitors then wrote on August 15 to say that the explanation given was unsatisfactory for the reasons stated in their earlier letters and that there was no agreement on February 25 on the tapping changes and application of stimulant, and they then said that the plaintiffs would like to have a meeting with the defendants to try to resolve the differences arising from their recent correspondence.

I would also refer to the evidence of PW1 in answer to me to the effect that would-be sub-purchasers had complained sometime in May or June 1967, about the change in the tapping system and the use of stimulant and had refused to purchase as a result. But there is no other evidence whatsoever to substantiate this bare statement. The evidence discloses that with regard to the changes made by the defendants which they say were effected with the consent and approval of the plaintiffs, the intensity was to remain the same but that there was an increase in intensity was due to the introduction of a 7-day week by Sunday tapping which was agreed to by the plaintiffs as evidenced by the correspondence I have referred to and the evidence of DW4 and DW2. And DW4 said that the change in the tapping system would be a long-term benefit.

On a consideration of all the matters I have adumbrated, I find that the changes effected in the tapping system, the application of stimulant and the introduction of Sunday tapping were all made with the full knowledge, consent and approval of the plaintiffs and that there has accordingly been no breach of clause 10 of the agreement, and that even if there had been any breach by a unilateral introduction of these changes in the first instance, and I have found otherwise, the plaintiffs had acquiesced in the changes made and introduced and had by their conduct waived any such breach of clause 10.

Termination of Agreement and Forfeiture of Deposit.

I have already referred to the plaintiffs' request for a meeting with the defendants to resolve their differences by their solicitors' letter of August 15. A meeting was accordingly arranged for August 25 at the office of the defendants' agents in Ulu Tiram, Johore, and this was confirmed by a letter of August 19 from the defendants' solicitors to the plaintiffs' solicitors which also asked for any proposals the plaintiffs might have with regard to the existing planting system so that the defendants might give their consideration thereto prior to the meeting on August 25. This meeting at Ulu Tiram took place as arranged with Dr. Yiap present together with the plaintiffs representing the purchasers and 5 persons including DW1, DW3 and DW4 on behalf of the defendants. After that meeting PW1 wrote to the defendants' agents on August 30 setting out what transpired at the meeting regarding the completion of the sale, and in his letter he referred to complaints about the labour troubles and the changes in the tapping system and the application of stimulant and then asked for a six months' extension of time for completion and also referred to the tumbling rubber price.

PW1 in cross-examination agreed that the sole purpose of that meeting on August 25 was to ask for a six months' extension of time and by this admission he supports and corroborates the evidence of DW1 to the same effect. PW1 said that at that meeting he

did say that the change in the tapping system was a serious breach of the agreement but agreed that he did not mention this in his letter of August 30. He agreed that the sole purpose for asking for an extension of time was because the plaintiffs did not have the money to pay the balance purchase price to complete the purchase. I have previously referred to his evidence in cross-examination when he agreed that the defendants were aware that time was of the essence and were doing everything possible to comply with the terms of the agreement.

The defendants' solicitors wrote on September 6 to the plaintiffs' solicitors in reply to this letter of August 30. They said that there was only a very brief reference at the meeting on August 25 to the alleged breach of clause 10 of the agreement and that the plaintiffs' real object of the meeting was to seek a further indulgence from the defendants as to the date of completion. They referred to their repeated requests for proposals from the plaintiffs regarding the tapping system on the estate but that none had been forthcoming, not even at the meeting on August 25 in Ulu Tiram. This letter stated that the plaintiffs had in fact put certain proposals at the Ulu Tiram meeting with regard to the carrying out of the agreement but had now resiled. It concluded with a request that the plaintiffs should immediately put forward realistic alternative proposals for consideration by the defendants' board on the basis that unless the sale was completed on September 30 pursuant to the agreement the deposit of $300,000 would be irrevocably forfeited, and went on to state that any fresh proposals should constitute a fresh offer to purchase the estate for $2.7 million with a new forfeitable deposit of not less than 10 per cent of that sum.

The contents of this letter of September 6 are borne out by the evidence of DW1, which I accept, when he said *inter alia* that the labour problem was never mentioned and the change in the tapping system only very cursorily. I do not accept the evidence of PW1 when he said that the labour force trouble was discussed. It is highly significant that with both Dr. Yiap and DW4 present at this meeting in Ulu Tiram on August 25, the plaintiffs did not confront the defendants with an allegation that Dr. Yiap had never agreed to the tapping changes, the application of stimulant and the introduction of Sunday tapping. And equally surprising is the fact that the plaintiffs at that meeting never raised for discussion these questions of Sunday tapping, the application of stimulant and manuring although Hawkins, the Visiting Agent and the author of D11, DW3, DW4 and Dr. Yiap were there.

The plaintiffs' solicitors replied on September 16 putting forward fresh proposals by the plaintiffs for the purchase of the estate for $2.4 million with completion at the end of April 1968, and stating categorically that the plaintiffs had been compelled to seek a reduction in the original price because of the reduced market value of the estate in view of the prevailing rubber price. The defendants' solicitors replied on September 19 to the effect that the proposals made were wholly unacceptable and that unless the sale was completed on September 30 in accordance with the agreement or more realistic proposals acceptable to the defendants were forthcoming, the defendants would have no alternative but to terminate the agreement and forfeit the deposit.

The plaintiffs then asked for another meeting between the parties to put forward fresh proposals for the purchase of the estate, and the meeting was in fact arranged for September 26, 1967, at the defendants' solicitors' office in Kuala Lumpur, and this was confirmed by a letter of September 22 from the defendants' solicitors. The meeting as arranged took place and by a letter dated September 28 the plaintiffs' solicitors wrote to the defendants' solicitors referring to that meeting in Kuala Lumpur on September 26 and making a last and final offer, briefly to the effect that the plaintiffs would purchase the estate at a reduced price of $2.6 million with completion on April 30, 1968.

The defendants' solicitors replied on September 30 to the plaintiffs' solicitors to confirm their telephone conversation that the plaintiffs' proposals were wholly unacceptable to the defendants and stating that unless the sale was completed in accordance with the provisions of the agreement before noon that day, the defendants would declare the agreement at an end and forfeit the deposit of $300,000. By another letter of the same date the defendants' solicitors wrote to the plaintiffs giving notice of termination of the agreement under clause 5 thereof and the forfeiture of the deposit of $300,000 as a result of the failure of the plamtiffs to complete the purchase before noon that day. The plaintiffs' solicitors wrote to the defendants' solicitors on October 5, 1967, to say that the defendants were not entitled to forfeit the deposit of $300,000 and intimated their instructions to commence proceedings for the recovery of that sum.

DW1 said in his evidence that the defendants were at all times able and willing to complete the sale in accordance with the agreement but the plaintiffs were unable to do so at the agreed price. I accept this evidence and also find substance in the contention of the defendants that the earlier complaints about lack of access to the estate due to interference by the labourers and the changes in the tapping system, the application of stimulant, the introduction of Sunday tapping and the question of manuring were only a smoke-screen through which the plaintiffs hoped to be able to resile from the agreement.

Law: Conclusion.

I hold accordingly on a balance of probabilities that there were no breaches of clauses 10, 18 or 19 of the agreement as alleged by the plaintiffs. Even if the plaintiffs had been able to prove the breaches alleged, these were not in any event, in my view, fundamental breaches according to established authorities in law and would not amount to a repudiation of the agreement by the defendants as alleged and would only entitle the plaintiffs, if at all, to sue for damages. On the assumption that the breaches alleged had been established, and I have found they have not, on the facts and circumstances in this case the plaintiffs have not discharged the burden of proof on them that the breaches committed were fundamental

and, in any event, they did not elect to rescind the agreement, that is to say, they did not treat the agreement as discharged and furthermore never indicated to this effect to the defendants, nor did they indicate that they had suffered any ascertainable or quantified loss or damage. On the evidence they affirmed the agreement by treating it at all material times as still in force and subsisting, and by asking for an extension of six months to complete the purchase they would have waived their rights regarding the alleged breaches if there had been any.

Under the provisions of clause 5 and in law, the defendants were entitled to forfeit the deposit and part payment in the sum of $300,000 if the plaintiffs were in breach of the agreement in not completing the purchase by paying the balance purchase price on the date fixed for completion, namely, September 30, 1967, (*Howe* v. *Smith;*[1] *S.S. Maniam* v. *The State of Perak;*[2] *Linggi Plantations Ltd.* v. *Jagatheesan*[3]), and I so hold.

With regard to the plaintiffs' contention that by reason of the extension of one month granted for completion extending the date for completion from August 30 to September 30, 1967, time then became at large and the defendants had accordingly waived the provision that time was of the essence and that the plaintiffs were therefore entitled to be given a reasonable time to complete the purchase of the estate, it is necessary to distinguish between a waiver and an extension of time which is not a waiver.

In *Barclay* v. *Messenger,*[4] Sir George Jessel M.R., said (at page 354):

"It appears to me plain that a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not utter destruction of the essential character of the time."

The same approach, that is, that an extension does not necessarily involve waiver, was taken in *Howe* v. *Smith,*[1] *Lock* v. *Bell*[5] and by the High Court of Australia in *Tropical Traders Ltd.* v. *Goonan*[6] where Kitto J., (at pages 53-55) adopted the language of Fry L.J., in *Howe* v. *Smith*[1] (at pages 103-104): "this was not a stipulation postponing the time for completion generally, but merely limiting the exercise of a consequential power." The time for doing an act, where time is already of the essence of the contract, may be extended under such circumstances that such extension of time does not waive the new time as being of the essence (*Lock* v. *Bell;*[5] *Howe* v. *Smith*[1] (at page 104); *White* v. *Ross*[7] (at pages 248-249). The facts and circumstances of the case before me come within the principle enunciated in *Barclay* v. *Messenger*[4] which was distinguished in *Wong Kup Sing* v. *Jeram Rubber Estates Ltd.*[8] where there were six extensions with continued negotiations after the extended dates and an increased forfeitable deposit.

In *Luck* v. *White*[9] Goulding J., said (at page 95) that the mere extension of the period to a new fixed date would on the authorities have preserved the position that time was of the essence, without fresh stipulation to that effect. In *Buckland* v. *Farmer & Moody*[10] Buckley L.J., said (at page 937):

"It is common ground between the parties that if a vendor has once made time of the essence of the contract and then allows a further extension to a fixed date the time remains essential."

In that case the English Court of Appeal held *inter alia* that the extensions of time given were to fixed dates and had not counteracted the effect of the completion notice in making time of the essence of the contract.

The one and only extension of time for completion granted by the defendants in this case was to a fixed date, September 30, 1967. On the evidence, the defendants were at all times ready, willing and able to perform their part of the agreement but not so the plaintiffs as the evidence discloses they could only do so if at all at a reduced price and that too at a further extended time of at least seven months according to their last and final offer contained in their solicitors' letter of September 28, 1967. I find that by the extension of the completion date by a period of one month from August 30 to September 30, 1967, time was not waived and did not become at large but remained at all times still of the essence and that there was therefore no question that the plaintiffs were entitled, as they claim, to be given reasonable time to complete the purchase of the estate.

Mr. Chelliah finally submits that even if he is wrong in all his submissions, in the circumstances of this case, despite clause 4 of the agreement making time of the essence of the contract, equity can and will step in to prevent the forfeiture of the deposit if it considers forfeiture to be unconscionable; he is in effect asking for equitable relief against forfeiture. This principle of the intervention of equity to relieve is not applicable where the Contracts Act, 1950 applies in view of its specific provisions (*Linggi Plantations Ltd.* v. *Jagatheesan*[3]), and the position is unlike that in *Tay Say Geok* v. *H.G. Warren*[11] which involved the sale of land in Malacca where the English common law of contract applied at the material time.

I have already touched on the matter of the sale of the estate by the defendants to The Great Alonioners Trading Corporation Berhad at a loss of $400,000 as a result of the default of the plaintiffs, and the defendants would, in any event, be entitled to set off this sum against any moneys repayable to the plaintiffs.

It follows in the result that there must be judgment for the defendants. I accordingly dismiss the plaintiffs' claim with costs.

Claim dismissed.

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